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The Surrogacy (Regulation) Bill, 2019

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The Surrogacy (Regulation) Bill, 2019¹

Introduction

The Surrogacy (Regulation) Bill, 2019 proposes to regulate surrogacy in India by establishing National Surrogacy Board at the Central level, and State Surrogacy Boards and Appropriate Authorities in the States and Union Territories. The proposed legislation ensures effective regulation of surrogacy, prohibits commercial surrogacy and allows ethical surrogacy to the needy infertile Indian couples.

Background

India has emerged as a surrogacy hub for couples from different countries for the past few years. Incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes have been reported from time to time. There have also been widespread condemnation of commercial surrogacy in India which has regularly been reflected in different print and electronic media for the last few years. As there is lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics, which leads to rampant of commercial surrogacy and unethical practices in the said area of surrogacy.

The Salient Features of the bill are as follows:

- (a) to constitute the Surrogacy Boards at National and State level;
- (b) to allow ethical altruistic surrogacy to the intending infertile Indian married couple between the age of 23-50 years and 26-55 years for female and male respectively;

¹ The Surrogacy (Regulation) Bill, 2019 was introduced by the Minister of Health and Family Welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 2019.

- (c) the intending couples should be legally married for at least five years and should be Indian citizens to undertake surrogacy or surrogacy procedures;
- (d) to provide that the intending couples shall not abandon the child, born out of a surrogacy procedure, under any condition and the child born out of surrogacy procedure shall have the same rights and privileges as are available to the biological child;
- (e) the surrogate mother should be a close relative of the intending couple and should be an ever married woman having a child of her own and between the age of 25-35 years;
- (f) to provide that the surrogate mother shall be allowed to act as surrogate mother only once;
- (g) to constitute the Surrogacy Board at National level which shall exercise and perform functions conferred on it under the Act. It is also proposed to constitute Surrogacy Boards at the State and Union territory level to perform similar functions in respective States and Union territories;
- (h) to appoint one or more appropriate authorities at State and Union territory level which shall be the executive bodies for implementing the provisions of the Act;
- (i) to provide that the surrogacy clinics shall be registered only after the appropriate authority is satisfied that such clinics are in a position to provide facilities and can maintain equipments and standards including specialised manpower, physical infrastructure and diagnostic facilities as may be provided in the rules and regulations;
- (j) to provide that no person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind shall undertake commercial surrogacy, issue advertisements regarding commercial surrogacy, abandon the child born through surrogacy, exploit the surrogate mother, sell human embryo or import human embryo for the purpose of surrogacy and contravention of the said provisions shall

be an offence punishable with imprisonment for a term which shall not be less than ten years and with fine which may extend to ten lakh rupees.

Key observations and recommendations² of the Select Committee are:

- Commercial vs. altruistic surrogacy: Surrogacy is the practice where one woman carries the child for another with the intention of handing over the child after birth. The Bill prohibits commercial surrogacy and allows altruistic surrogacy. Altruistic surrogacy involves no compensation to the surrogate mother other than the medical and insurance expenses related to the pregnancy.
- The Committee recommended a surrogacy model based on compensation rather than altruistic surrogacy. The compensation must take care of the losses suffered by the surrogate mother in terms of health and wages. The Committee observed that surrogacy has been considered as an economic opportunity by the women from economically weak backgrounds. By banning commercial surrogacy, the Bill ignores the fact that altruistic surrogacy is also exploitative.
- the Committee recommended that surrogacy could be classified on the basis of the specific intention with which a woman agrees to be a surrogate mother. The intention could be to either: (i) render a paid service and make money, or (ii) do it for altruistic reasons.
- Implications of the surrogate being a ‘close relative’: Under the Bill, the surrogate can only be a ‘close relative’ of the intending couple. The

² The Select Committee on the Surrogacy (Regulation) Bill, 2019 (Chairperson: Mr. Bhupender Yadav) submitted its report on February 5, 2020.

Committee noted that the criteria of being a ‘close relative’ potentially restricts the availability of surrogate mothers and may affect persons in genuine need. It recommended deleting the definition of ‘close relative’ and allowing any willing woman to act as a surrogate mother.

- **Five year waiting period:** Under the Bill, the intending couple can undertake a surrogacy arrangement following the inability to conceive after five years of unprotected coitus or other medical conditions preventing conception. The Committee observed that the requirement of a five year waiting period is too long particularly in conditions like absent uterus, removal of uterus due to cancer, fibroids, and medical conditions where normal pregnancy is ruled out.
- The Committee recommended removing the definition of infertility from the Bill and the five year waiting period. It recommended that any couple who have a medical condition (could be either or both members of the couple) which necessitates gestational surrogacy, it should be allowed to undertake surrogacy. Gestational surrogacy is a practice where a surrogate mother carries a child for the intending couple through implantation of embryo in her womb and the child is not genetically related to the surrogate mother.
- **Persons who can avail surrogacy services:** The Bill limits the option of surrogacy to legally married Indian couples, with certain age restrictions. The Committee noted that this overlooks other sections of the society who may want a surrogate child. It recommended that the eligibility criteria be widened to include women who are widows or divorcees, and between the age of 35 to 45 years. It recommended that intending couples of Indian origin should also be allowed to undertake surrogacy.

- **Insurance cover:** The Bill provides for 16 months of insurance coverage to a surrogate mother. The Committee recommended extending this to 36 months.
- **Appeals:** In order to initiate a surrogacy procedure, the surrogate mother and the intending couple are required to obtain certificates of eligibility and essentiality upon fulfilling various conditions from the relevant appropriate authorities. However, the, the Bill does not specify a review or appeal procedure in case the surrogacy applications are rejected. The Committee recommended that the intending couple or the surrogate mother can file an appeal with the state government within 30 days from the rejection of the surrogacy application.
- **Assisted Reproductive Technology (ART) Bill:** The Committee noted that surrogacy clinics include centres and labs conducting ART services such as in-vitro fertilisation. In this context, it recommended that the ART Bill should be introduced before the Surrogacy (Regulation) Bill, 2019. This will allow addressing all the highly technical and medical aspects in the Surrogacy (Regulation) Bill, 2019.

References:

1. The Surrogacy (Regulation) Bill, 2019

https://www.prsindia.org/sites/default/files/bill_files/Surrogacy%20%28Regulation%29%20Bill%2C%202019.pdf

2. Select Committee Report

https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/70/137/1_2020_2_17.pdf

STATEMENT OF OBJECTS AND REASONS

India has emerged as a surrogacy hub for couples from different countries for past few years. There have been reported incidents of unethical practices, exploitation of surrogate mothers, abandonment of children born out of surrogacy and import of human embryos and gametes. Widespread condemnation of commercial surrogacy in India has been regularly reflected in different print and electronic media for last few years. The Law Commission of India has, in its 228th Report, also recommended for prohibition of commercial surrogacy by enacting a suitable legislation. Due to lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics, which leads to rampant of commercial surrogacy and unethical practices in the said area of surrogacy.

□ In the light of above, it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy.

□ The Surrogacy (Regulation) Bill, 2019, *inter alia*, provides for the following, namely:—

(a) to constitute the Surrogacy Boards at National and State level;

(b) to allow ethical altruistic surrogacy to the intending infertile Indian married couple between the age of 23-50 years and 26-55 years for female and male respectively;

(c) the intending couples should be legally married for at least five years and should be Indian citizens to undertake surrogacy or surrogacy procedures;

(d) to provide that the intending couples shall not abandon the child, born out of a surrogacy procedure, under any condition and the child born out of surrogacy procedure shall have the same rights and privileges as are available to the biological child;

(e) the surrogate mother should be a close relative of the intending couple and should be an ever married woman having a child of her own and between the age of 25-35 years;

(f) to provide that the surrogate mother shall be allowed to act as surrogate mother only once;

(g) to constitute the Surrogacy Board at National level which shall exercise and perform functions conferred on it under the Act. It is also proposed to constitute Surrogacy Boards at the State and Union territory level to perform similar functions in respective States and Union territories;

(h) to appoint one or more appropriate authorities at State and Union territory level which shall be the executive bodies for implementing the provisions of the Act;

(i) to provide that the surrogacy clinics shall be registered only after the appropriate authority is satisfied that such clinics are in a position to provide facilities and can maintain equipments and standards including specialised manpower, physical infrastructure and diagnostic facilities as may be provided in the rules and regulations;

(j) to provide that no person, organisation, surrogacy clinic, laboratory or clinical establishment of any kind shall undertake commercial surrogacy, issue advertisements regarding commercial surrogacy, abandon the child born through surrogacy, exploit the surrogate mother, sell human embryo or import human embryo for the purpose of surrogacy and contravention of the said provisions shall be an offence punishable with imprisonment for a term which shall not be less than ten years and with fine which may extend to ten lakh rupees.

The Notes on Clauses explain in detail the various provisions contained in the Surrogacy (Regulation) Bill, 2019.

The Bill seeks to achieve the above objectives.

NEW DELHI;

DR. HARSH VARDHAN

The 5th July, 2019.